No. 80-765

In the Supreme Court of the United States

OCTOBER TERM, 1980

BROWN INSULATING SYSTEMS, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the decision of the Occupational Safety and Health Review Commission, which found that petitioner had committed serious and willful violations of occupational health standards, promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, by failing to adopt engineering controls to limit exposure of its employees to asbestos fibers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported. A summary of the opinion of the Occupational Safety and Health Review Commission (Pet. App. A3-A26) is reported at 1978 Occup. Safety & Health Dec. para. 22,790.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1980. On September 9, 1980, Justice Stewart extended the time in which to petition for a writ of certiorari to and including November 13, 1980 (Pet. App. A27). The petition was filed on November 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a manufacturer of insulating sleeves for risers used in the foundry industry, was cited by the Secretary of Labor for serious and willful violations (see 29 U.S.C. 666(a), (j)) of the OSHA health standard for occupational exposure to asbestos. 29 C.F.R. 1910.1001. Petitioner was cited for violating that part of the standard which provides that "[t]he 8-hour time-weighted average air-borne concentrations of asbestos fibers to which any employee may be exposed shall not exceed two fibers, longer than 5 micrometers, per cubic centimeter of air" (29 C.F.R. 1910.1001(b)(2)), and for failing to implement "[e]ngineering controls, such as, but not limited to, isolation, enclosure, exhaust ventilation, and dust collection * * * to meet the exposure limits * * *" (29 C.F.R. 1910.1001(c)(1)(i)). The Secretary also issued a notification of failure to correct previous uncontested violations of the same standards.

Despite previous citations for violations of these provisions (Pet. App. A20), employees at petitioner's plant engaged in mixing and wet-cutting asbestos at the time of the inspection were exposed to concentrations of airborne

asbestos fibers greatly in excess of those permitted by the standard (*id.* at A8-A11).[1] A shop-type vacuum cleaner, which does not satisfy the standard's requirements, was the only "engineering control" being used (*id.* at A12). Although the requirements of the standard had previously been brought to petitioner's attention, petitioner had taken no steps to institute appropriate engineering controls because "the contractors would not guarantee the equipment would reduce airborne asbestos fibers to within the limits of the standard" (*id.* at A14). At the time of the inspection, petitioner was apparently attempting to protect its employees principally through the use of respirators (*id.* at A15), a strategy prohibited by the standard. See 29 C.F.R. 1910.1001(d)(1). Although petitioner determined not to comply with the standard, at no time did it seek a variance; it decided instead to take unilateral action. See 29 U.S.C. 655(d).

The administrative law judge found that petitioner was in serious willful violation of the exposure limit and engineering controls provisions of the standard and that petitioner had failed to correct its previous violations (Pet. App. A25). The citation was therefore affirmed and a penalty of $3,000 was assessed (*id.* at A26).

Petitioner sought judicial review on various grounds. The court of appeals affirmed (Pet. App. A1-A2), holding that the statute and regulation were constitutional and that the

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[1]The OSHA compliance officer took samples of the airborne concentrations of asbestos fibers at the mixing and wet-cutting operation locations pursuant to established OSHA sampling procedures. The samples were analyzed by an OSHA technician, and it was determined that the mixing operator was exposed to an 8-hour time-weighted average of 19.7 fibers longer than 5 micrometers per cubic centimeter of air, while the wet cutting operator was exposed to an 8-hour time-weighted average of 4.73 fibers longer than 5 micrometers per cubic centimeter of air. Both exposures far exceeded the maximum permissible limits (Pet. App. A8).

Commission's finding that the ambient air in petitioner's plant violated the regulation was supported by substantial evidence (*id.* at A2). The court further concluded that the record contained substantial evidence that it was economically feasible to use available equipment as engineering controls to bring petitioner's plant into compliance (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 12-13) that it is arbitrary and capricious for the Secretary to determine compliance with the asbestos standard by measuring the degree of contamination in the ambient air, rather than by measuring the air inside the respirators that were being worn at the time of the OSHA inspection. That contention is without merit because ambient air monitoring, which is a central feature of all OSHA toxic substance standards,[2] is rationally related to the overall purpose of the asbestos standard.

The purpose of this standard is to limit the airborne concentrations of asbestos fibers to which any employee may be exposed (29 C.F.R. 1910.1001(b)(2)), and petitioner does not contend that the exposure level set by the Secretary is unnecessary to protect employee health. See 37 Fed. Reg. 11318 (1972). Based on the record developed during the asbestos rulemaking proceeding, the Secretary found that this level could best be attained by controlling the generation of fibers through moisturization and by employing engineering controls to limit the dispersion of released fibers into the ambient air (*id.* at 11319). Because respirators may be ill-fitting, uncomfortable and burdensome, the Secretary found that they constitute a less reliable means of ensuring employee health protection (*ibid.*) and that compliance should be achieved through respirators only in

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[2]See, *e.g.*, 43 Fed. Reg. 27384 (1978) (cotton dust); 43 Fed. Reg. 19617 (1978) (arsenic); 41 Fed. Reg. 46773 (1976) (coke oven emissions). See also *American Smelting and Refining Co.* v. *OSHRC*, 501 F. 2d 504 (8th Cir. 1974).

limited circumstances not present here.[3] The Secretary thus determined that employers must utilize engineering controls such as enclosure and dust collection (29 C.F.R. 1910.1001(c)(l)(i)) and adopt moisturization as a work practice (29 C.F.R. 1910.1001(c)(2)).

The preference for engineering controls contained in the asbestos standard is plainly rational, and it has been judicially approved. See *Industrial Union Dep't, AFL-CIO* v. *Hodgson*, 499 F. 2d 467, 481-483 (D.C. Cir. 1974). The courts of appeals have also uniformly upheld the Secretary's preference for engineering controls on review of other toxic substance standards. See *AFL-CIO* v. *Marshall*, 617 F. 2d 636 (D.C. Cir. 1979), cert. granted on other grounds, No. 79-1429 (Oct. 6, 1980) (cotton dust); *Society of Plastics Indus, Inc.*, v. *OSHA*, 509 F. 2d 1301 (2d Cir. 1975) (vinyl chloride); *American Iron and Steel Institute* v. *OSHA*, 577 F. 2d 825 (3d Cir. 1978), cert. dismissed, No. 78-918 (Sept. 10, 1980) (coke oven emissions). The requirement that the standard be met through engineering controls rather than respirators logically entails that compliance be determined through ambient air testing. The measurement of air inside a respirator mask would not indicate the relevant level of employee exposure for purposes of determining either the necessity for engineering controls or the adequacy of such controls.[4]

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[3]Respirators may be used to achieve compliance only during the period necessary to install engineering controls and in those circumstances where work practices and engineering controls are either technically infeasible or feasible to an extent that is insufficient to reduce airborne concentrations below the permissible level. 29 C.F.R. 1910.1001(d)(1)(i)-1910.1001(d)(1)(ii).

[4]In the court below, petitioner also challenged the technological methodology used by the Secretary in analyzing petitioner's air samples. See Ct. App. Br. 34-36. Petitioner apparently does not renew that challenge here. At all events, the specific analytical methods used by the Secretary in this case present no question of general applicability warranting review by this Court.

2. Petitioner also contends (Pet. 12, 17, 19-20) that the engineering controls provision of the asbestos standard violates the "equal rights" guaranteed by the First, Fourth and Fourteenth Amendments and that the statute is invalid under the Commerce Clause. These contentions are insubstantial. First, petitioner's "equal rights" contention is effectively negated by its assertion below (Tr. 377-381 (July 22, 1977)) that it is the only firm engaged in this particular manufacturing process. Moreover, legislation designed to promote the general welfare commonly burdens some persons more than others. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 133 (1978). Second, petitioner's Commerce Clause argument lacks merit because there is a rational basis for Congress' finding that the activities regulated by this statute affect interstate commerce (*Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940)), and the regulatory means selected by Congress are reasonable (*Heart of Atlanta Motel, Inc.* v. *United States, supra*, 379 U.S. at 258-259; *Katzenbach* v. *McClung, supra*, 379 U.S. at 304). Indeed, petitioner has not challenged the congressional finding that personal injuries and illnesses are a burden upon interstate commerce, nor has it asserted that the means selected by Congress for regulation of commerce are unreasonable or irrational.

3. Finally, petitioner asserts (Pet. 16) that the application of the standard will "put [it] out of business." That contention lacks merit for two reasons. First, Congress clearly did not intend to guarantee the continued existence of employers who could not comply with OSHA standards. *Industrial Union Dep't, AFL-CIO* v. *Hodgson, supra*, 499 F. 2d at 478. See also *EPA* v. *Nat'l Crushed Stone Ass'n*, No. 79-770 (Dec. 2, 1980), slip op. 14-18. Second, even if petitioner's alleged financial inability to comply with the

standard were relevant, petitioner has not adduced any proof to show that compliance will "put [it] out of business." As the court of appeals concluded (Pet. App. A2), "there was substantial evidence that it was economically feasible and with available equipment to bring the ambient air in [petitioner's] plant into compliance with the regulation." Despite petitioner's repeated assertions that the costs of engineering controls would be fatal, it never obtained bids on enclosures, it had no idea what the cost of ventilation would be, and it adduced no evidence to show that it would be unable to absorb those costs. Moreover, given the fact that petitioner is the only firm that manufactures its product (Tr. 381 (July 22, 1977)), it is far from evident that petitioner could not raise prices to cover compliance costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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